

No. 24-1323

IN THE SUPREME COURT
OF THE UNITED STATES

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ORIGINAL

Peter Kleidman,
Petitioner,

v.

Audrey B. Collins, Justice, et al.,
Respondents.

FILED
MAR 05 2025
OFFICE OF THE CLERK
SUPREME COURT, U.S.

On Petition for Writ of Certiorari
to the US Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Question 1. Is this Court willing to use its supervisory power to formulate a rule (fashioned after FRAP 28(j)) which requires a Court of Appeals, when desiring to decide a case based on an authority issued after the appellate briefing was complete, to first provide the parties an opportunity to be heard on the appropriateness of the new authority?

Question 2. Is this Court willing to use its supervisory power to formulate a rule which prevents a Court of Appeals from deciding a case based on a legal theory which was neither briefed by the parties nor identified in the parties' statements of issues presented for review under FRAP 28(a)(5), 28(b)(2); or, to at least create a rule which requires the Court of Appeals, before issuing its decision, to first provide the parties an opportunity to be heard on the appropriateness of that legal theory?

Question 3. Should the appellate case below be reopened because the Ninth Circuit decided the case based on an authority which arose after the appellate briefing was complete, without affording the parties to be heard thereon?

Question 4. Should the appellate case below be reopened because the Ninth Circuit decided the case based on a legal theory which was neither briefed by the parties nor identified in their statements of issues presented for review under FRAP 28(a)(5), 28(b)(2)?

PARTIES TO THE PROCEEDING

California Chief Justice Patricia Guerrero,¹ Justice Audrey B. Collins, Justice Thomas L. Willhite, Jr.,² Justice Brian S. Currey, RFF Family Partnership, LP.

STATEMENT OF RELATED PROCEEDINGS

Kleidman v. Collins, No. 23-55128 (9th Cir.)

Kleidman v. Collins, No. 2:22-cv-03263-CJC-JDE (C.D. Cal.)

Kleidman v. RFF Family Partnership, LP, No. 23-55610 (9th Cir.)

Kleidman v. RFF Family Partnership, LP, No. 2:22-cv-03947-SPG-AM (C.D. Cal.)

Kleidman v. RFF Family Partnership, LP, California Superior Court, County of Los Angeles, Nos. 19SMCV01711 & SC122303

Kleidman v. RFF Family Partnership, LP, California Court of Appeal, 2nd Appellate District, Nos. B302449, B320714.

¹ The action was originally brought against the prior Chief Justice in her official capacity.

² Justice Willhite has retired.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Kleidman petitions this Court for a writ of certiorari to the US Court of Appeals for the Ninth Circuit.

DECISIONS BELOW

Kleidman v. Collins, No. 23-55128 (9th Cir.)

Kleidman v. Collins, No. 2:22-cv-03263-CJC-JDE (C.D. Cal.)

Kleidman v. RFF Family Partnership, LP, No. 23-55610 (9th Cir.)

Kleidman v. RFF Family Partnership, LP, No. 2:22-cv-03947-SPG-AFM (C.D. Cal.)

JURISDICTION

This petition covers two Ninth Circuit decisions under Supreme Court Rule 12.4, namely Nos. 23-55128 (*Kleidman v. Collins*) and 23-55610 (*Kleidman v. RFF Family Partnership, LP*).

Kleidman's petitions for rehearing in the Ninth Circuit were denied December 5, 2024. Accordingly, the deadline for this petition is March 5, 2025.

This Court has jurisdiction under 28 USC § 1254.

STATUTORY PROVISION INVOLVED

Federal Rule of Appellate Procedure 28(j). Citation of Supplemental Authorities. If pertinent and significant authorities come to a party's attention after the party's brief has been filed—or after oral argument but before decision—a party may promptly advise the circuit clerk by letter, with a copy to all other parties, setting forth the citations. The letter must state the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally. The body of the letter must not exceed 350 words. Any response must be made promptly and must be similarly limited.

STATEMENT OF THE CASE

Kleidman v. Collins

In federal district court, Kleidman sued state court Justices in the California Court of Appeal for the Second Appellate District. *Kleidman v. Collins*, No. 2:22-cv-03263-CJC-JDE (C.D. Cal.).

Kleidman lost in the district court and appealed to the Ninth Circuit, giving rise to *Kleidman v. Collins*, No. 23-55128 (9th Cir.).

The briefing in the Ninth Circuit was completed on December 4, 2023, when Kleidman filed his Reply Brief under FRAP 28(c).

On August 28, 2024, the Ninth Circuit issued its Memorandum decision, which held:

The district court properly dismissed Count 1 of Kleidman's amended complaint as barred by the Eleventh Amendment.

See Munoz v. Superior Ct. of L.A. County, 91 F.4th 977, 981 (9th Cir. 2024) ("[S]tate court judges cannot be sued in federal court in their judicial capacity under the Eleventh Amendment.").

App.1.

Notably, *Munoz* was issued in 2024, after Kleidman's Reply Brief was filed in 2023. None of the parties had filed or served a letter pursuant to FRAP 28(j).

Kleidman was blindsided by the Ninth Circuit's reliance on *Munoz* because he had no opportunity to address it. Accordingly, Kleidman protested in his Petition for Rehearing that the Ninth Circuit's adjudication was fundamentally unfair, since the parties had no opportunity to be heard on the appropriateness of *Munoz*. App.5-7.

The Ninth Circuit denied Kleidman's Petition for Rehearing. App.3.

Kleidman v. RFF

In federal district court, Kleidman sued RFF Family Partnership, LP and the Chief Justice of the California Supreme Court (qua chair of the California Judicial Council). *Kleidman v. RFF Family Partnership, LP*, No. 2:22-cv-03947-SPG-AFM (C.D. Cal.).

Kleidman's complaint challenged certain aspects of California's vexatious litigant statutory scheme.

The District Court dismissed the action without prejudice on the grounds of lack of jurisdiction under *Rooker-Feldman* and want of Article III standing. App.15-19; App.19-23.

Kleidman appealed to the Ninth Circuit, giving rise to *Kleidman v. RFF Family Partnership, LP*, No. 23-55610 (9th Cir.).

In Kleidman's Opening Brief, he identified the statement of issues presented for review under FRAP 28(a)(5) as follows:

- whether the *Rooker-Feldman* applied to the action;
- whether Kleidman had Article III standing;
- whether judicial immunity applied to the action;
- whether the Eleventh Amendment applied to the action.

App.24-25.

The Appellees' Brief identified the same issues for review under FRAP 28(b)(2). App.26.

The parties' briefing was limited to these issues.

Remarkably, the Ninth Circuit's Memorandum decision was based on a different legal theory.

The district court properly dismissed Kleidman's constitutional claims because Kleidman failed to allege facts sufficient to show that California's vexatious litigant statute violated his constitutional rights.

See Wolfe v. George, 486 F.3d 1120, 1125-27 (9th Cir. 2007) (upholding as constitutional California's prefilings requirements on vexatious litigants).

App.8.

Kleidman was blindsided by the Ninth Circuit's decision because he had no opportunity to address this issue raised for the first time in the appellate proceedings. Accordingly, Kleidman protested in his Petition for Rehearing that the Ninth Circuit's manner of adjudication violated Kleidman's due process rights, since the parties had no opportunity to be heard on the legal theory raised *sua sponte* by the court. App.27-30.

Kleidman's Petition for Rehearing was denied.
App.10.

REASONS TO GRANT THIS PETITION

I. This Court can grant certiorari to exercise its supervisory powers over a Court of Appeals' practices and procedures

This Court may grant certiorari when the Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings ... as to call for an exercise of this Court's supervisory power." Supreme Ct. R. 10(a).

This Court may use its supervisory power to assure that the Courts of Appeals conduct themselves in a manner which is "consistent with "the principles of right and justice.'" (Frazier v. Heebe, 482 US 641, 645-646 (1987); Burton v. US, 196 US 283, 307-308 (1905) (barring certain practice because it "is not to be commended"). In the exercise of its supervisory power, this Court "may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress." US v. Hasting, 461 US 499, 505 (1983).

This Court's supervisory powers may be used "to implement a remedy for violation of recognized rights." *Ibid.*

II. The Court should exercise its supervisory power to prevent a Court of Appeals from unfairly blindsiding a party by deciding a case by invoking a new authority (issued after the appellate briefing was completed) without first allowing the parties to be heard on the appropriateness of that new authority

In *Kleidman v. Collins*, the Ninth Circuit cited *Munoz* as grounds to dismiss the action against the California Justices. App.1. *Munoz* was decided after the appellate briefing was complete and no FRAP 28(j) letter was filed or served by the parties. It was manifestly unfair for the Ninth Circuit to have invoked *Munoz* in this manner without allowing the parties to be heard on the appropriateness of *Munoz*.

When a relevant authority is issued after the appellate briefing is complete, a FRAP 28(j) letter is the means by which a party brings the new authority to the attention of the court and the other parties. But, as a matter of fundamental fairness, the other parties are allowed to *respond* to a FRAP 28(j) letter. FRAP 28(j) ("response must be made promptly").

For instance, in *Mylan Pharmaceuticals, Inc. v. Research Corp. Tech., Inc.*, 914 F.3d 1366 (Fed. Cir. 2019) (*Mylan*), the Supreme Court's decision in *SAS Institute Inc. v. Iancu*, 584 US 357 (2018) was "issued after the briefing was complete." *Mylan*, at 1377. The appellants sought to introduce an argument based on the *SAS* decision. However, the appellants, rather than filing and serving a FRAP 28(j) letter regarding *SAS*, or even mentioning *SAS* in their opening oral argument, instead "chose to raise [their *SAS*

argument] in their rebuttal [oral] argument. *Ibid.* In so doing, the appellee (RCT) "had no meaningful opportunity to respond" to the appellants' *SAS* argument. *Ibid. Mylan* found that allowing appellants to introduce their *SAS* argument in this manner "would result in basically unfair procedure," and accordingly found appellants' *SAS* argument deemed "waived." *Ibid. App.5.*

Clearly, it is "basically unfair procedure" (*Mylan*, at 1377) for a Court of Appeals to rule against a party based on a new authority arising after the appellate briefing is complete, without allowing the party to be heard thereon. Accordingly, it is requested that this Court exercise its supervisory power to formulate a rule which prevents a Court of Appeals from relying on a new authority (issued after the appellate briefing is complete) without first giving the parties the opportunity to be heard on the appropriateness of that new authority.

It is further requested that the Court apply such a rule to *Kleidman v. Collins*, and thereupon reopen the case in the Ninth Circuit so that the parties can brief the appropriateness of *Munoz*.

III. The Court should exercise its supervisory power to prevent a Court of Appeals from unfairly blindsiding a party by deciding a case based on a legal theory which was neither briefed by the parties nor identified in their statements of issues for review, without first allowing the parties to be heard on that legal theory

In *Kleidman v. RFF Family Partnership, LP*, the parties' briefing and statements of issues for review under FRAP 28(a)(5), (b)(2) was limited to *Rooker-Feldman*, Article III standing, judicial immunity and the Eleventh Amendment. App.24-26. However, the

Ninth Circuit decided the appeal based on (inter alia) a different legal theory, namely Kleidman's purported failure to allege sufficient facts. App.8. It was manifestly unfair for the Ninth Circuit to have done so without first allowing the parties to be heard on the appropriateness of this legal theory.

Accordingly, it is requested that this Court exercise its supervisory power to formulate a rule which prevents a Court of Appeals from deciding a case based on a legal theory which was neither briefed by the parties nor presented in their statements of issues for review, without first giving the parties the opportunity to be heard on the appropriateness of that legal theory.

It is further requested that the Court apply such a rule to *Kleidman v. RFF Family Partnership, LP*, and thereupon reopen the case in the Ninth Circuit so that the parties can brief the appropriateness of the Ninth Circuit's legal theory that Kleidman failed to allege sufficient facts.

CONCLUSION

It is requested that this Court grant this petition for certiorari to the Ninth Circuit Court of Appeals

Dated: March 5, 2025

Respectfully,

/s/ Peter Kleidman

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